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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)
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Foreign Ownership Guidelines for FCC Common) DA 04-3610
Carrier and Aeronautical Radio Licenses)
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PETITION FOR RECONSIDERATION

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To: The International Bureau

PETITION FOR RECONSIDERATION

Wilkinson Barker Knauer, LLP ("Wilkinson Barker")[1] hereby files this petition for reconsideration of the *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, DA 04-3610, (the "*Guidelines*") released by the International Bureau (the "Bureau") on November 17, 2004, which impose limits on foreign investment that did not heretofore exist.[2]

[1] Wilkinson Barker is a law firm concentrating in telecommunications law and providing legal services both to Commission licensees and to foreign entities investing in Commission licensees. While petitions for reconsideration from law firms are unusual, the Commission has entertained such petitions where the public interest would be served by resolving the issues being raised. *See Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C.; Petition for Reconsideration of Wireless Telecommunications Bureau Clarifies Unified Policy for Dismissing and Returning Applications, Public Notice, DA 01-3004*, 17 FCC Rcd 16100 (WTB 2002). As discussed herein, the *Guidelines* raise significant questions regarding the Commission's application of the alien ownership restrictions set forth in sections 310(b)(3) and (b)(4) of the Communications Act of 1934, as amended (the "Act"). Resolving the matters addressed herein will clearly serve the public interest because the Bureau's interpretation of the Act implicates issues of national and international import.

[2] Although the *Guidelines* state that they are not binding legal precedent, Wilkinson Barker submits they nevertheless constitute a "final" action ripe for reconsideration under section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106. First, the regulatory bar against petitions for reconsideration of interlocutory actions is applicable only where a proceeding "still has a course to run in terms of its own frame of reference." *Cf. National Automatic Laundry and Cleaning Council v. Schultz*, 443 F. 2d 689, 700-701 (D.C. Cir. 1971) (contrasting an interlocutory ruling in an ongoing proceeding to a final ruling where the acting party's "interpretative action has come to an end"). The Bureau, however, does not contemplate any further procedures relating to the *Guidelines*. Consequently, the *Guidelines* are "final" and eligible for reconsideration. *Cf. Ciba-Geigy Corp. v. U.S. Environmental Protection Agency*, 801 F.2d 430, 436-37 (D.C. Cir. 1986) (letter from EPA delegatee deemed final when it "gave no indication that it was subject

INTRODUCTION AND SUMMARY

Wilkinson Barker appreciates the Bureau's efforts to summarize the current state-of-the-law regarding foreign investment in common carrier and aeronautical radio licenses (hereinafter "common carrier licenses" or "licenses"). Indeed, the Bureau has done much to clarify the information to be provided, and the issues to be addressed, by practitioners and applicants seeking Commission approval for common carrier radio license transactions involving foreign investment. The Bureau's objectives are particularly appropriate in light of the complex foreign ownership issues arising from the interaction between the Commission's obligation to employ market-opening policies on the one hand, and the increasing scrutiny of foreign investment in common carrier radio licenses on the other, given national security concerns.

Nevertheless, the *Guidelines* depart from Commission practice and precedent and are in error in one critical respect. Specifically, prior to the *Guidelines*, the Commission had reviewed, under the standards of section 310(b)(4) of the Act, foreign investment in a U.S. company that in turn holds a controlling or non-controlling interest in a Commission licensee. The *Guidelines* now state, however, that the standards of section 310(b)(4) will be applied only in situations where the U.S. company holds a controlling interest in the licensee. Section 310(b)(3) will now govern where a foreign entity invests in a domestic company that in turn holds a non-controlling

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to further agency consideration or possible modification"). Second, the issues raised by the *Guidelines* are purely legal, and parties with potential or actual foreign investment will be affected in the absence of review. For example, the *Guidelines* expressly dictate "the information that the Commission requires" to be included in applications under section 310 of the Act. *Guidelines* at 4. Moreover, "the Bureau expects that these Guidelines will be used by licensees to ensure their continuing compliance with the foreign ownership requirements of Section 310 of the Act." *Id.* In other words, the Bureau clearly intends the *Guidelines* to govern on a going-forward basis. To that end, the *Guidelines* are effectively self-executing and thus are ripe for review. *See Citizens Communications Center v. FCC*, 447 F.2d 1201, 1207 (D.C. Cir 1971).

interest in a licensee.[3] In short, the *Guidelines* appear to establish a new approach to minority indirect investment that would have a very real and deleterious impact on how foreign investment in the U.S. telecommunications market is structured in the future. To the extent that the Commission intends to change its current practice and precedent and apply section 310(b)(3) to non-controlling indirect foreign investment on a prospective basis, however, it must do so through a rulemaking or other procedure which allows for public notice and comment.

Wilkinson Barker, therefore, requests that the Bureau revise the *Guidelines* to reflect the Commission's current practice of permitting foreign investment up to 100 percent (where such investment is in the public interest) in a U.S. company that in turn owns a Commission licensee under the standards established in section 310(b)(4) of the Act. Continued application of the section 310(b)(4) foreign ownership standards to indirect, non-controlling ownership interests will ensure that a foreign entity cannot evade Commission scrutiny by investing in a domestic company that has a non-controlling ownership interest in a licensee. At the same time, however, application of section 310(b)(4) in these circumstances will avoid creating a new barrier to entry or illogically subjecting foreign non-controlling, indirect investment to a stricter standard than that pertaining to foreign investments in a company that controls a licensee.

In the alternative, the Bureau should exercise its discretion under 47 C.F.R. § 1.106 to refer this matter to the full Commission for resolution of the critical issues of national and international import discussed in this petition.[4]

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[3] *Guidelines* at 6, 20. For ease of reference, a foreign entity's ownership interest in a U.S. company that in turn holds a non-controlling interest in a Commission licensee is described as a "non-controlling, indirect interest" or a "minority, indirect interest." This investment structure is contrasted with the situation where a foreign entity holds an interest in a U.S. company that in turn holds a *controlling* interest in a Commission common carrier licensee. This second ownership structure is referred to herein as a "controlling, indirect interest."

[4] The Commission's Rules "allow the staff to refer any matters to the Commission." *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations,* 17 FCC Rcd 14830 ¶ 2 (2002). Indeed, peti-

DISCUSSION

I. INTERPRETING SECTION 310(b) IN THE MANNER SET FORTH IN THE *GUIDELINES* WOULD CREATE A NEW BARRIER TO FOREIGN ENTRY INTO THE U.S. TELECOMMUNICATIONS MARKET

Under section 310(b)(3) of the Act, foreign individuals, corporations, and governments are prohibited from owning of record or voting more than 20 percent of the stock of a U.S. broadcast, common carrier, or aeronautical radio station licensee.[5] Section 310(b)(4), by contrast, establishes a 25 percent benchmark for investment by foreign individuals, corporations, and governments in entities that control a U.S. broadcast, common carrier, or aeronautical radio station licensee.[6] This section also grants the Commission discretion to allow higher levels of foreign ownership (up to 100 percent) where it finds that such ownership is consistent with the public interest.[7] In short, section 310(b)(3) represents an absolute bar to direct alien ownership of a Commission licensee in excess of 20 percent, while section 310(b)(4) sets a conditional limit of 25 percent on alien investment in a domestic company that, in turn, controls a licensee.

Section 310(b) does not address foreign investment in companies with an indirect, *non-controlling* interest in a licensee. The *Guidelines*, however, state that section 310(b)(3) "applies in situations where a foreign government, individual, or corporation holds equity or voting interests in a licensee through an intervening domestically organized holding company that itself

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tions for reconsideration of actions taken pursuant to delegated authority are routinely referred to the Commission. *See, e.g., WXTV License Partnership, G.P.*, 15 FCC Rcd 3308 ¶ 1 (2000); *Metropolitan Fiber Systems/New York, Inc.*, 12 FCC Rcd 6901, 6902 ¶ 2 (1997).

[5] Section 310(b)(3) prohibits from holding a license "any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country." 47 U.S.C. § 310(b)(3).

[6] Section 310(b)(4) prohibits from holding a license "any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representatives thereof, or by any corporation organized under the laws of a foreign country. . . ." *Id.* § 310(b)(4).

[7] *Id.*

holds *non-controlling* interests in the licensee."[8] In other words, the *Guidelines* conclude that section 310(b) empowers the Commission to grant applications that result in a non-U.S. entity holding up to a 100 percent interest in a U.S. company that *controls a licensee*, but bars the Commission from even considering applications from the same non-U.S. entity if it intends to invest greater than 20 percent in a domestic company that *does not control a licensee.* The implications of the Bureau's interpretation are significant because it effectively constitutes a new barrier to foreign entry into the U.S. market.[9]

Indeed, establishing such a barrier to entry directly conflicts with the Commission's "open entry standard for [World Trade Organization ("WTO")] Member applicants."[10] In 1997, 69 nations and the United States took the historic step of concluding the WTO Basic Telecommunications Agreement, committing to open their markets for basic telecommunications services. In response to these WTO commitments, the Commission adopted a new approach to foreign investment from WTO member nations, which "includes a presumption in favor of foreign participation by the applicants."[11] The Bureau's interpretation of section 310(b), by contrast, effectively bars foreign participation in the U.S. market in some circumstances.

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[8] *Guidelines* at 6 (emphasis supplied).

[9] Assume, by way of example, an existing corporate licensee composed of two shareholders, one holding 70 percent and the other 30 percent (or a partnership comprised of a 70 percent general partner and a 30 percent limited partner). Under the *Guidelines*, a foreign entity would face an absolute bar against acquiring the 30 percent interest – even through a domestic holding company – unless the foreign entity could persuade the 70 percent shareholder to move the licenses into a wholly-owned subsidiary. This is something that the controlling domestic entity may or may not be willing to do, and also may raise tax consequences that may themselves constitute a barrier to entry by rendering such transactions uneconomic.

[10] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, 12 FCC Rcd 23891, 23897 ¶ 13 (1997) ("*Foreign Participation Order*").

[11] *Id.* at 23897-98 ¶ 13.

Further, the Commission made clear in its *Foreign Participation Order* that its application of section 310(b) was consistent with the United States' WTO commitments.[12] In that decision, the Commission expressly rejected arguments that its practice of applying the foreign ownership standards of section 310(b)(4) to minority indirect ownership was contrary to the U.S.'s obligations.[13] Moreover, the U.S.'s 1997 Schedule of Specific Commitments describes the limitations on market access that are applied in situations where there is a "Direct" foreign commercial presence and declares that there is no limitation on market access where the foreign commercial presence is "Indirect."[14] Contrary to these representations, the *Guidelines* assume that the section 310(b)(3) market access limitation applies to minority indirect foreign ownership. This result is in conflict with the market-opening policies that the U.S. and other nations have agreed to follow.

II. THE *GUIDELINES'* INTERPRETATION OF SECTION 310(b)(3) IS INCONSISTENT WITH THE STATUTE, ITS LEGISLATIVE HISTORY, AND CURRENT COMMISSION PRACTICE AND PRECEDENT

The *Guidelines* provide no rationale in support of the conclusion that section 310(b)(3) governs indirect, non-controlling investment in a licensee. The *Guidelines* state, without elaboration, that section 310(b)(3) "applies in situations where a foreign government, individual, or corporation holds equity or voting interests in a licensee through an intervening domestically organized holding company that itself holds *non-controlling* interests in the licensee."[15] The *Guidelines* state further that section 310(b)(4) applies in cases of indirect ownership when the

[12] *Id.* at 24040-24052 ¶¶ 344-375.

[13] *Id.* at 24044 ¶ 353, 24046 ¶ 357 (rejecting arguments that the section 310(b)(4) public interest test contravenes national treatment obligations, including arguments by France Telecom regarding "section 310(b)(4) authorizations below 50 percent").

[14] *See* United States of America Schedule of Specific Commitments, Supplement 2, General Agreement on Trade in Services, at ¶ 2.C supplementing pages 45-46 of document GATS/SC/90 (April 11, 1997).

[15] *Guidelines* at 6 (emphasis supplied).

"domestically organized holding company ... directly or indirectly *controls* the licensee."[16] In the Bureau's view:

> [c]ontrol is relevant to the Commission's foreign ownership analysis because it determines whether the Commission will analyze a particular transaction under Section 310(b)(3) or 310(b)(4) of the Act. The Commission will analyze a particular transaction or application under Section 310(b)(3) if a foreign investor holds a non-controlling interest directly in the licensee or in an intervening holding company that, in turn, holds a non-controlling interest in the licensee. By contrast, the Commission will analyze a particular transaction under Section 310(b)(4) if a foreign investor holds interests in a U.S. holding company that, in turn, holds a controlling interest in the licensee.[17]

Commission precedent, however, has applied section 310(b)(3) to direct alien ownership and section 310(b)(4) to indirect ownership situations, and has done so without regard to whether the foreign investment is in a domestic company that controls the licensee. The Commission, for example, has asserted that, where a "proposed transaction does not involve *direct foreign investment* ..., it does not trigger section 310(b)(3) of the Act, which places a 20% limit on *direct* alien, foreign corporate or foreign government ownership of entities that hold common carrier, broadcast and aeronautical fixed or en route Title III licenses."[18] The Commission has clarified further that while section 310(b)(3) "applies to [] direct ownership, ... [i]ndirect foreign ownership, on the other hand, is governed by section 310(b)(4) of the Act."[19] The Commission also

[16] *Id.* at 7 (emphasis supplied).

[17] *Id.* at 20.

[18] *Bell Atlantic New Zealand Holdings, Inc., and Pacific Telecom Inc.*, 18 FCC Rcd 23140, n.70 (2003) (emphasis supplied); *see Global Crossing Ltd. (Debtor-in-Possession), and GC Acquisition Limited,* DA 03-3121, n.81 (2003) (same); *Lockheed Martin Corporation, COMSAT Corporation, and COMSAT Digital Teleport, Inc., and Intelsat, Ltd., Intelsat (Bermuda), Ltd., Intelsat LLC, and Intelsat USA License Corp.*, 17 FCC Rcd 27732, n.127 (2002) (same).

[19] *Glentel Corp.*, 17 FCC Rcd 12008, n.9 (2002).

recognized in the *DT-Voicestream Order* that "[n]othing in the language of section 310(b)(4) limits its application to holdings that amount to less than control."[20]

In the *DT-Voicestream Order*, the Commission considered petitions for declaratory ruling under section 310(b)(4) of the Act filed by entities in which Voicestream held "indirect, non-controlling interests."[21] Specifically, Cook Inlet/VS GSM IV PCS, LLC, Cook Inlet/VS GSM V PCS, LLC and Wireless Alliance, L.L.C. each filed petitions under section 310(b)(4) seeking Commission authority to accept non-controlling indirect foreign ownership in excess of 25 percent resulting from VoiceStream's acquisition by Deutsche Telekom.[22] Further, the filing entities were designated entities ("DE") and were themselves licensees. The Commission granted the petitions under section 310(b)(4), despite the fact that Voicesteam's indirect investments in the DE licensees were necessarily through companies that did not control the licensee.[23] The interpretation of section 310(b)(3) set forth in the *Guidelines* conflicts with this and other Commission decisions. The Bureau does not have delegated authority to set aside decisions issued by the full Commission.

The *Guidelines* do not discuss this precedent, but instead rely solely on the Commission's 1985 *Wilner & Scheiner* decision.[24] It appears that the Bureau is relying upon language in *Wilner & Scheiner* which reflects a general Commission policy against permitting foreign entities to evade the section 310(b) limitations based solely on the fact that investment is made

[20] *Voicestream Wireless Corp. et al.*, 16 FCC Rcd 9779 ¶ 39 (2001) ("*DT-Voicestream Order*").

[21] *Id.* at ¶ 127.

[22] *Id.* at ¶¶ 129-134.

[23] *Id.*

[24] *Guidelines* at 6 n.5 citing *Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended,* Declaratory Ruling, 103 F.C.C. 2d 511, 520-522 ¶¶ 16-20, n.45 (1985) ("*Wilner & Scheiner*"), *reconsidered in part,* 1 FCC Rcd 12 (1986).

through a domestically organized company.[25] Additional language in that case suggests that section 310(b)(4) governs only investment in a company that *controls* a licensee.[26] Consequently, it appears that the Bureau views section 310(b)(3) as necessarily applying to foreign investment in a domestic company that holds a non-controlling interest in a licensee to prevent such arrangements from being used to enable foreign entities "to easily circumvent the clear intent of Congress to limit the level of influence of or ownership by aliens in broadcast licenses."[27]

The Bureau's reliance on *Wilner & Scheiner* is misplaced.[28] In addition to the subsequent case law cited above, the Bureau's conclusion that *Wilner & Scheiner* compels the application of section 310(b)(3) to *indirect*, non-controlling investment cannot be squared with language in that same decision stating that "the alien ownership provisions contained in Section 310(b)(3) . . . apply to non-controlling interests *directly* in the licensee."[29]

Further, and perhaps more important, *Wilner & Scheiner* was decided in 1985 in the broadcast context and the legal landscape has dramatically changed since then, particularly for common carrier licensees. As discussed above, the Commission has now established an open entry standard for investment from WTO Members. In addition, Congress amended section 310(b) in 1996 to remove the previous bar preventing a licensee or its parent company from having foreign officers, or directors, which had the effect of allowing increased foreign participation

[25] *Wilner & Scheiner*, 103 F.C.C. 2d at 521 ¶ 19.

[26] *Id.* at 521 n.45.

[27] *Id.* at 521 ¶ 19.

[28] That case involved only the narrow issue of whether Section 310(b) applied to *limited partnership interests* in broadcast stations. Specifically, the Commission was asked to "state whether aliens may hold limited partnership interests aggregating more than 20 percent of the ownership of a licensee or aggregating more than 25 percent of a partnership directly or indirectly controlling a corporate licensee." 103 FCC 2d at 521 ¶ 1. The Commission ruled that limited partnership interests would be counted in calculating the amount of foreign equity interests held in a licensee.

[29] *Id.* at 524 ¶ 22 (emphasis supplied).

in the governance of U.S. telecommunications companies.[30] Therefore, *Wilner & Scheiner* should not be held up as the definitive statement on this issue, as the *Guidelines* suggest.

As noted above, it was Commission practice to review, under the standards of section 310(b)(4) of the Act, foreign investment in a U.S. company that in turn holds a controlling or non-controlling interest in a Commission licensee and to review direct foreign investment under section 310(b)(3). This practice is a reasonable interpretation of the statute and its legislative history.

Looking first to the statutory language, the plain language of sections 310(b)(3) and (b)(4) reveals that a foreign entity is prohibited from *directly* owning more than 20 percent of a common carrier radio licensee,[31] but may *indirectly* control up to 100 percent of a licensee with Commission approval.[32] This reading of the statute reflects the common-sense conclusion that public interest concerns with foreign investment in licensees abate the further removed a foreign entity is from the licensee in the chain of ownership. The interpretation of section 310(b)(3) expressed in the *Guidelines*, however, subjects *non-controlling,* indirect interests in the licensee to a stricter standard (a bar not to exceed 20 percent) than that pertaining to *controlling,* indirect

[30] Prior to 1996, section 310(b) prohibited a licensee or its parent company from having foreign officers or directors. In 1996, Congress removed these limitations. *See generally, In the Matter of Parts 20, 21, 22, 24, 26, 80, 90, 100, and 101 of the Commission's Rules to Implement Section 403(k) of the Telecommunications Act of 1996,* 11 FCC Rcd 13072 at ¶ 6 (1996).

[31] Section 310(b)(3) is described as governing "direct" ownership because the statutory language speaks to foreign entities being the owners of record or voting the stock of a licensee. In contrast, in "indirect" foreign ownership situations a U.S. entity is the owner of record or votes the stock of the licensee, and that U.S. entity is in turn owned by a foreign entity, as reflected in the placement of the language "owned of record or voted" in section 310(b)(4).

[32] 47 U.S.C. § 310(b)(3), (b)(4).

interests (up to 100 percent).[33] This result is counter-intuitive and, for this reason alone, the interpretation of section 310(b)(3) set forth in the *Guidelines* cannot be correct.[34]

Turning next to the legislative history of section 310(b), it is apparent that Congress did not contemplate applying section 310(b)(3) to indirect, non-controlling foreign investment arrangements. As the Commission stated in the *DT-Voicestream Order*, the legislative history of section 310(b) "indicates that the categories of restrictions developed over time to reach situations where the foreign connection was progressively less direct and [they] imposed restrictions that were progressively less absolute."[35] In that regard, the Radio Act of 1912 (the "1912 Act") required licensees to be U.S. citizens or domestic corporations and, in effect, prohibited aliens, foreign governments, or foreign corporations from holding licenses. This requirement, however, did not touch whether a license could be "held by a domestic corporation that was itself a subsidiary of a foreign corporation."[36]

The Radio Act of 1927 (the "1927 Act"), in turn, imposed foreign ownership restrictions in language quite similar to that currently contained in sections 310(a), (b)(1), (b)(2), and (b)(3).

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[33] This interpretation creates the anomaly that it would be impermissible for an alien corporation to wholly own a U.S. subsidiary that holds only 20.01 percent of a licensee's voting stock, but it would be permissible for the same alien corporation to hold directly 20 percent of the licensee's voting stock and 25 percent of the voting stock of a parent corporation holding the remaining 80 percent without any Commission review. *See Guidelines* at 23.

[34] It has long been recognized that if a "literal construction of the words [would] be absurd, the Act must be construed to avoid the absurdity." *Holy Trinity Church v. United States*, 143 U.S. 457, 460 (1898); *see also Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454-55 (1989); *Red River Broadcasting Co., Inc. v. FCC*, 98 F.2d 282, 287 (D.C. Cir 1938); *Yankee Network, Inc. v. FCC*, 107 F.2d 212, 219-20 (D.C. Cir. 1939); *Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Sections 3(37) and 251(h) of the Communications Act*, 12 FCC Rcd 6925, 6946-47 ¶ 37 (1997); *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8471 (1995), reconsideration denied, 11 FCC Rcd 7773 (1996); Sutherland Statutory Construction at § 46:07 ("[I]t is clear that if the literal import of the text of an act is inconsistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be modified to agree with the intention of the legislature").

[35] *DT-Voicestream Order*, 16 FCC Rcd 9779 at ¶ 35.

[36] *Id.*

In doing so, the 1927 Act addressed the question of whether a license could be held by a domestic corporation that was directly owned by a foreign entity. Congress adopted a less restrictive approach than the 1912 Act's absolute bar to aliens holding licenses; it permitted domestic licensees to be owned up to 20 percent by aliens.[37] The 1927 Act, however, was silent regarding whether a license could be held by a domestic company that was in turn owned by a domestic holding company that was a subsidiary of a foreign company.

Congress added a new wrinkle by adopting section 310(b)(4) in the Communications Act of 1934 to address situations involving foreign ownership of domestic holding companies that in turn control domestic licensees. This new statutory provision permitted domestic holding companies to be owned up to 25 percent by aliens and authorized the Commission to allow greater investment on a case-by-case basis.[38] Again, the Commission has found that "[n]othing in the language of section 310(b)(4) limits its application to holdings that amount to less than control."[39]

In sum, as the Commission has made clear, the legislative history of section 310(b) reveals that "the precursor of sections 310(a) and 310(b)(1)-(3), 'Section 12 of the [1927] Act restricting alien control of radio-station licenses [did] *not apply to [domestic] holding companies*.'"[40] Section 310(b)(4), in turn, "was added in 1934 to address *indirect ownership and con-*

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[37] *Id.* The relevant language of the 1927 Act is now reflected in section 310(b)(3) of the Act.

[38] *Id.* at ¶ 36.

[39] *Id.* at ¶ 39.

[40] *Id.* at ¶ 40 (citing H.R. Rep. No. 1918, 73d Cong., 2d Sess. 48 (1934) ("*1934 Act Conference Report*")) (emphasis supplied). This same legislative history notes that the remainder of section 310(b) ((1) through (3)) is largely based on the restrictions of section 12 of the Radio Act, and that modifications to the Radio Act reflected in the current version of 310(b)(3) did not expand (b)(3) to holding companies. *1934 Act Conference Report* at 48-49.

trol situations that were not considered covered" previously.[41] Nothing in the legislative history, however, suggests that section 310(b) covers foreign investment in a *non-controlling* domestic holding company. This silence calls into question the legal underpinnings of the *Guidelines'* conclusion that section 310(b)(3) necessarily applies to non-controlling indirect ownership. In fact, the Bureau's reliance on section 310(b)(3) in this context conflicts with Congressional intent, as interpreted by the Commission, to limit the application of section 310(b)(3) to direct ownership situations.

CONCLUSION

For the foregoing reasons, Wilkinson Barker submits that the *Guidelines'* analysis of section 310(b)(3) does not, in the one critical respect discussed herein, comport with the express terms of section 310(b), the legislative history of that provision, or Commission practice and precedent. Indeed, the *Guidelines* appear to establish a new approach to minority indirect investment that would have a very real and deleterious impact on how foreign investment in telecommunications is structured in the future. The Bureau should therefore revise its *Guidelines* to reflect the Commission's practice of applying section 310(b)(3) only to *direct* alien ownership of licensees and section 310(b)(4) to all *indirect* ownership, regardless of whether the foreign investment is in a U.S. company that controls the licensee. Stating that the Commission applies the section 310(b)(4) standards to non-controlling, indirect investment will serve the important policy objective of ensuring that significant foreign investment does not evade Commission review and will avoid the illogical result of imposing a stricter standard on non-controlling indirect investment than that applied to controlling indirect investments.

[41] *DT-Voicestream Order*, 16 FCC Rcd 9779 at ¶ 40 (emphasis supplied).

In the alternative, Wilkinson Barker urges the Bureau to exercise its discretion under 47 C.F.R. § 1.106 to refer this matter to the full Commission for resolution.

Respectfully submitted,

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